Supreme Court, U.S.
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No. 91-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF CALIFORNIA;
VENTURA COUNTY MUNICIPAL COURT;
ATTORNEY GENERAL
FOR THE STATE OF CALIFORNIA,

Petitioners,

v.

KAREN SUE MORRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT HOWARD SIEGEL
333 South Hope Street
Mail Code H23-80
Los Angeles, California 90071
(213) 345-2437
(213) 345-3318 FAX

Attorney, Pro Bono Publico,
(Counsel of Record)
for Respondent,
Karen Sue Morris.

Washington, D.C. • THIEL PRESS • (202) 328-3288

QUESTIONS PRESENTED FOR REVIEW

1. Should this court review a finding that the doctrine of judicial estoppel may not be invoked where its use would serve to keep a conviction in effect regardless of the innocence or guilt of the defendant?

2. Whether respondent should forfeit her sixth amendment right to the effective assistance of counsel for having testified at trial contrary to that in support of habeas corpus based upon erroneous advice given to her by trial counsel.

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STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case pertaining to A. TRIAL and B. STATE HABEAS and offers the following in lieu of Petitioner's rendition of C. FEDERAL HABEAS.

C. FEDERAL HABEAS.

On May 5, 1988, defendant filed a habeas corpus petition in the United States District Court for the Central District of California, pursuant to 28 USC § 2254. In support of the petition, defendant introduced the same two declarations submitted in the state habeas proceedings - namely, her own and that of her trial counsel.

In her declaration, Ms. Morris stated that she had ingested methamphetamine prior to her arrest and that she had not ingested cocaine. She further said that she had informed her trial counsel of that fact, and that he had told her "being charged with being under the influence of methamphetamines was the equivalent to being charged with being under the influence of 'cocaine'." The declaration of Ms. Morris' trial counsel makes identical representations. It states:

> "During the time that I represented both appellant and her husband, they both advised me that appellant was under the influence of methamphetamine and Tylenol with codeine at the time of her arrest in the within action. They both denied the allegation that she was under the influence of cocaine at the time of her arrest. These representations were made to me both before, during and after appellants' [sic] trial in the within action. ... I was of the opinion that being under the influence of methamphetamine or cocaine were each respectively, a violation of Health and Safety Code § 11550. However at no time prior to or during appellant's trial did I confirm that being under the

> influence of methamphetamine was described, or included in, or proscribed by Health and Safety Code § 11550. ... I advised the appellant that since it was an offense to be under the influence of methamphetamine (even though it was not) she should not offer it as a defense to the charges of under the influence of cocaine."

On May 3, 1990, United States Magistrate Robert M. Stone issued a Report and Recommendation, recommending that habeas corpus relief be granted based on counsel's incompetence in failing to object to evidence that the defendant used cocaine on one prior occasion, six years before the charged offense. However, the magistrate held that the doctrine of judicial estoppel precluded the defendant from making factual assertions regarding her ingestion of methamphetamine because these assertions were contrary to her own sworn testimony at trial.

By order entered July 6, 1990, United States District Judge John G. Davies approved and adopted the magistrate's findings regarding trial counsel's incompetence and the applicability of the doctrine of judicial estoppel. Judge Davies, however, rejected the magistrate's conclusion that counsel's deficient performance regarding the prior use of cocaine mandated habeas corpus relief, ruling instead that it was harmless error. Accordingly, the district judge denied the petition for writ of habeas corpus.

On August 2, 1990, defendant timely appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 USC § 2253 and Rule 22 of the Federal Rules of Appellate Procedure. On September 30, 1991, the court issued an opinion authored by Judge Stephen Reinhardt, reversing the denial of habeas corpus relief. The court held that defendant was not judicially estopped from raising the methamphetamine claim and remanded the matter to the district court for an evidentiary hearing.

On or about October 11, 1991, petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On March 10, 1992, the United States Court of Appeals for the Ninth Circuit denied the petition for rehearing, rejected the suggestion for rehearing en banc and issued an amended opinion which, like the original opinion, reversed the denial of habeas corpus relief and remanded the matter to the District Court for further proceedings.

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REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner presents no special or important reason as to call for an exercise of this court's power or supervision.

Rule 10 of the Rules of the U.S. Supreme Court sets forth the grounds upon which the court will grant petitions for a writ of certiorari. While the reasons enumerated within the rule are not controlling, they add clarification to what a petitioner must present. Some of the characteristics, none of which have been presented by the petition, include:

> "(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; ...or has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision."
>
> "(c) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." [Rules of the Supreme Court of the United States, Rule 10 1.(a) and (c)]

Not one of the cases cited by the Petitioner supports the granting of the within petition. This is the only reported federal case of which Respondent is aware where the extraordinary circumstances and federal constitutional issues presented have been resolved. Moreover, the Court of Appeals' decision requires that the equitable doctrine of judicial estoppel yield to the constitutional mandate of the Sixth Amendment right to the effective assistance of counsel. The Court of Appeals' decision is not only sound but also consistent with the "accepted and usual course" taken by this Court. Finally, the opinion rendered by

the Court of Appeals so thoroughly addresses the issues presented by the petition that it would be a needless waste of this Court's time and resources to grant the petition so as to ultimately adopt the Court of Appeals' reasoning.

2. Respondent's trial counsel rendered ineffective aid prior to and during trial, a clear denial of respondent's constitutional right to counsel.

The opinion of the Court of Appeals in this case breaks no new ground. The question ab initio was whether or not Respondent's trial counsel's performance was so deficient and so prejudicial to Respondent as to have denied her a fair trial within the meaning of Strickland v. Washington, 466 US 668, 687 (1984). The Court of Appeals found that it was, assuming the declarations of Respondent and her trial counsel are true. The case was remanded to the District Court solely for a determination of that issue.

Petitioner suggests that one is estopped to assert a violation of the Sixth Amendment right if the accused has committed perjury relating to the underlying charge. This is placing the proverbial "cart before the horse." The Sixth Amendment right to effective assistance of counsel is not predicated upon the veracity of the accused. It is a federal constitutional mandate designed to preserve the integrity of the judicial process. It has been interpreted to require a minimum level of professional performance by an attorney in the representation of his client in a criminal case. The question of whether the Respondent has committed perjury before the trial court is not related to the question of whether her trial counsel rendered effective assistance in satisfaction of her Sixth Amendment right.

Petitioner suggests that the opinion of the Court of Appeals paves the way for persons convicted of crimes to change their story in support of habeas corpus relief. Not so, by reversing

the District Court, the Court of Appeals merely recognized that, if the facts presented are true and trial counsel's performance was not only deficient but that it prejudiced the defense, Respondent would be entitled to relief. However, the Court of Appeals remanded the case back to the District Court for further proceedings; assumably for a determination of whether Respondent can satisfy the two-pronged test of Strickland v. Washington, supra.

Moreover, Petitioner's concern can be countered with perjury prosecutions (which, in this case, Petitioner has not done). Our system of justice has been predicated upon preserving the rights of an accused. If an accused does not have an absolute and unfettered right to the effective assistance of counsel, then the reliance upon erroneous legal advice of counsel will result in the accused being punished twice -- first, for having testified in reliance on counsel's erroneous advice and, second, by being precluded from asserting the ineffective assistance of that counsel as guaranteed by the Sixth Amendment. The equitable doctrine of judicial estoppel must yield to the constitutional mandate where its invocation would result in judicial approval of the deprivation of a fundmental right.

Petitioner ignores that Respondent's Sixth Amendment right had been violated based upon trial counsel's erroneous advice. It is the failure of counsel to research the law and properly counsel Respondent that resulted in the suppression of facts which otherwise could have resulted in her acquittal.

This is clearly an ineffective aid of counsel case - not a perjury case - and not a complex one.

(1) Respondent was charged with being under the influence of cocaine, a crime. No trace of cocaine was found in her possession or her vehicle and there was no direct evidence at trial of cocaine use by Respondent.

(2) Respondent retained trial counsel (a sole practitioner). She advised trial counsel that she was under the influence of methamphetamine, not a crime at the time of her arrest. The symptoms manifested by the use of methamphetamine or the use of cocaine are essentially the same. Petitioner's own expert witness testified at trial to that similarity of symptoms.

(3) Unfortunately, Respondent's trial counsel failed to investigate carefully all defenses of fact and of law available to his client, and, instead assumed that being under the influence of methamphetamine was a crime and could not be used as a defense to the crime charged without subjecting Respondent to further criminal charges. As a result, he firmly warned Respondent not to offer as a defense at trial her use of methamphetamine, or she might be charged with another crime. This erroneous advice was not only incorrect as a matter of law, but resulted in the inexcusable withdrawal from Respondent of a crucial - if not complete - defense.

As the Court of Appeals observed:

> "[A]ssuming that the declarations [of Respondent and her trial counsel] are true, the performance of Ms. Morris' trial counsel was clearly deficient. Once she informed her attorney that she had been under the influence of methamphetamine, and not cocaine, he should have investigated and discovered that being under the influence of methamphetamine was not illegal at the time.[footnote omitted] Additionally, his advice to her that methamphetamine use and cocaine use were equally incriminating was far below any 'objective standard of reasonableness.'" [Petition, Appendix "A", pp. 2382-2383; Appendix "I", pp. 13682-13683].

In the face of these facts, it is abundantly clear that notwithstanding Respondent's testimony at trial, withholding the facts of her methamphetamine use was the direct result of a violation of a fundamental Constitutional right, the Sixth Amendment right to the effective aid of counsel [Murray v. Carrier 477 US 478, 496 (1986); See also; Coleman v. Thompson 501 US _____, 115 L. Ed. 2d 640,656, 111 S.Ct. 2546 2567 reh. denied, 115 L Ed. 2d 1109, 112 S.Ct. 27 (1991)] and not a proper subject for the application of judicial estoppel.

3. **Had respondent received the effective aid of counsel and been advised to testify fully and truthfully as to her use of methamphetamine, and not cocaine, it cannot be said that a result more favorable to her would not have occurred.**

Petitioner would like it to appear, and has in fact argued, that Respondent callously calculated to commit perjury at trial, for what Petitioner alleges to be an apparent "back-up defense" of altering her trial testimony later. Petitioner's allegations miss the mark. First, it must be remembered that we are concerned with habeas corpus relief which, if ultimately granted, will only win a reversal of the trial verdict and the need to conduct a new trial. Second, as the Court of Appeals recognized:

> "[I]f Ms. Morris' trial counsel had either been familiar with the law or done his homework and discovered that being under the influence of methamphetamine was not illegal, there is a reasonable probability that the outcome of the trial could have been different. ...If counsel had not been 'deficient' in the performance of his duties, he would have directed Ms. Morris to testify fully as to the drugs she had ingested prior to her arrest. Then he could have presented expert testimony showing that the effects of methamphetamine use are nearly identical to those of cocaine use. Combined with the complete

> absence of any physical evidence showing cocaine use, this could well have raised reasonable doubt in the jury's mind as to Ms. Morris' guilt." [Petition, Appendix "A" p. 2383; Appendix "I", p. 13683].

Respondent's trial counsel failed to investigate carefully all defenses of fact and of law available to his client. He is not charged with stupidity or duplicity. Respondent would have had the critical advantage at trial had she testified fully and truthfully about her use of methamphetamine on the day of her arrest. There is no reason to believe that she would not have so testified if her counsel had not directed her not to offer methamphetamine use as a defense at trial under penalty of possibly being charged with another crime. Any scenario which suggests that Respondent deliberately committed perjury, to her own knowing disadvantage, with a view to later "changing her story," is not only without any factual support but is also ludicrous, unimaginative, and invites the prompt rejection with which it has been met by the Court of Appeals.

4. There is no independent and adequate state ground which bars federal habeas corpus relief.

Petitioner contends that it was inappropriate for the Ninth Circuit to grant federal habeas corpus relief due to the existence of the "independent and adequate state ground doctrine" which bars federal habeas corpus relief when the accused fails to meet a state procedural requirement. Petitioner's reliance upon judicial estoppel as an independent and adequate state ground on which to uphold the Respondent's conviction is misplaced as it conflicts with the Respondent's constitutional right to effective assistance of counsel as guaranteed by the Sixth Amendment. As the Court of appeals observed:

> "[A] defendant may not default a constitutional claim through conduct that occurs as a result of the constitutional violation. ...Coleman v. Thompson, 111

> S.Ct.2526,2567 (1991)('Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.'); [Murray v. Carrier, 477 U.S. 478, 488 (1986)]. ...[B]ut for the ineffectiveness of counsel [Respondent] would not have testified falsely. Viewed in that light, [Respondent's] testimony is a direct result of her counsel's incompetence." [Petition, Appendix "A", pg. 2381].

Finally, the petitioner somehow equates Respondent's failure to raise the methamphetamine defense at the time of trial as a waiver of her right to assert a violation of her Sixth Amendment right to the effective assistance of counsel if that assertion is based upon statements she made pre-trial to counsel which are inconsistent with her trial testimony. That ignores the procedural ability habeas corpus affords the court to investigate facts not readily available from the record in search of the "truth."

5. Conclusion

Respondent contends that if she had received the effective assistance of counsel to which she is entitled under state and federal constitutions, counsel would have asserted in her defense all facts at trial which would have demonstrated her innocence of the crime charged. Had she so testified, no longer would the evidence against her at trial consist exclusively of nothing more than the arresting officer's subjective opinion that the symptoms he observed Respondent to have were caused by the use of "cocaine." Had Respondent received the effective aid of counsel, it cannot be said that a result more favorable would not have been had. [Strickland v. Washington, SUPRA, at 687; [People v. Stankewitz (1990) 51 Cal. 3d 72, 94].

For the foregoing reasons, the Petition for Writ of Certiarari should be denied.

Respectfully submitted,

SCOTT HOWARD SIEGEL
333 South Hope Street
Mail Code H23-80
Los Angeles, CA 90071
Telephone (213) 345-2437
Facsimile (213) 345-3318

Attorney, Pro Bono Publico,
(Counsel of Record)
for Respondent
Karen Sue Morris

August 21, 1992